



(Billing Code 5001-06)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212, 225, and 252**

**RIN 0750-AI41**

**Defense Federal Acquisition Regulation Supplement: Photovoltaic Devices from the United States (DFARS Case 2015-D007)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2015 that revises the restrictions relating to utilization of domestic photovoltaic devices.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2015-D007, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit

comments via the Federal eRulemaking portal by entering "DFARS Case 2015-D007" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2015-D007." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2015-D007" on your attached document.

- o E-mail: osd.dfars@mail.mil. Include DFARS Case 2015-D007 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy G. Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6106.

**SUPPLEMENTARY INFORMATION:**

## **I. Background**

DoD is proposing to revise the DFARS to implement section 858 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), which addresses utilization of domestic photovoltaic devices.

DFARS currently addresses utilization of domestic photovoltaic devices at DFARS 225.7017, Utilization of domestic photovoltaic devices, and the associated clause at 252.225-7017, Photovoltaic Devices, and provision at 252.225-7018, Photovoltaic Devices—Certificate. The current regulations that implement section 846 of the NDAA for FY 2011 (Pub. L. 111-383) were first published as an interim rule under DFARS Case 2011-D046 on December 20, 2011 (76 FR 78858) and finalized on May 22, 2012 (77 FR 30368). Some clarification of the rules of origin for photovoltaic devices to be utilized under covered contracts were published as an interim rule under FAR Case 2014-D006 on December 18, 2013 (78 FR 76993) and finalized on April 21, 2014 (79 FR 22041). Those clarifications are not affected by this rule.

## **II. Discussion and Analysis**

### **A. Analysis and interpretation of statutory requirements.**

Although section 858 of the NDAA for FY 2015 does not contain specific language to rescind or supersede section 846 of the NDAA for FY 2011, DoD has determined through detailed comparison

of the two statutes that compliance with section 858 will meet or exceed the requirements for compliance with section 846.

The most significant differences between the two statutes are as follows:

1. Covered contracts.

Section 846 applied to contracts awarded by DoD, including energy savings performance contracts, utility service contracts, land leases, and private housing contracts, to the extent that such contracts result in ownership of photovoltaic devices by DoD. Section 846 further provides that DoD is deemed to own a photovoltaic device if the device is—

- Installed on DoD property or in a facility owned by DoD;
- and
- Reserved for the exclusive use of DOD for the full economic life of the device.

Section 858 applies to any contract awarded by DoD that provides for a photovoltaic device to be—

- Installed inside the United States on DoD property or in a facility owned by DoD; or
- Reserved for the exclusive use of DoD in the United States for the full economic life of the device.

These conditions are generally the same except—

(1) Section 858 explicitly restricts applicability to the U.S., which is still equivalent to the section 846

applicability, because the Buy American Act invoked in section 846 does not apply overseas; and

(2) Section 858 substitutes "or" for "and" in connecting the two conditions. Therefore, either one of the conditions is sufficient to make the law applicable and compliance with section 858 will meet and exceed compliance with section 846.

Land leases are not addressed in this rule. Although section 846 mentioned land leases as an example of the type of contract that might be a covered contract, the current DFARS regulations do not address land leases, because land leases are outside the scope of the FAR and DFARS. As used in the FAR and DFARS, the term "acquisition" means the "acquiring by contract with appropriated funds of supplies or service (including construction)..." Section 858 does not mention or affect land leases.

## 2. Requirements.

Section 846 required that, with some exceptions, photovoltaic devices provided under covered contracts comply with the Buy American Act. The Buy American Act requires, for use inside the United States, that manufactured articles, materials and supplies be manufactured in the U.S., substantially all from articles, materials, or supplies mined, produced, or manufactured in the U.S.

Section 858 requires that any photovoltaic device installed under a covered contract be manufactured in the U.S. substantially all from articles, materials or supplies mined, produced, or manufactured in the United States. This requirement is the same as the basic requirement of the Buy American Act, but because this requirement is now separated from the explicit application of the Buy American Act, the exceptions and waivers that apply to the Buy American Act do not automatically apply to section 858, unless provided for and authorized by section 858.

However, to the extent section 858 does not differ from the Buy American Act, it is reasonable and within the regulatory authority of DoD to apply a similar interpretation to that which has developed with regard to the Buy American Act over the years. Consequently, it is not necessary, nor would it be desirable, to reinterpret elements of the Buy American Act that appear unchanged in section 858.

Executive Order (E.O.) 10582, Prescribing Uniform Procedures for Certain Determinations under the Buy-American Act, signed December 17, 1954, has interpreted "substantially all" in the Buy American Act to mean that the cost of domestic components is at least 50 percent of the value of all components. It is reasonable to interpret the same language regarding "substantially all" in section 858 to have the same meaning

established by the E.O. for interpretation of the Buy American Act.

3. Exceptions for domestic nonavailability and micro-purchase threshold.

The Buy American Act provides exceptions for domestic nonavailability and acquisitions below the micro-purchase threshold. These exceptions are not provided in section 858.

4. Public interest determination.

The Buy American Act provides for individual or class determinations that application of the Buy American Act is inconsistent with the public interest. Through public interest class determinations, DoD does not apply the Buy American Act to (1) qualifying country end products; or (2) U.S.-made end products, if the World Trade Organization Government Procurement Agreement applies (i.e., the aggregate value of the photovoltaic devices to be utilized is \$204,000 or more). Section 858 allows determinations that application of the restriction in 858 is not in the public interest, but only on a case-by-case basis. Therefore, in order to allow a contractor to utilize a qualifying country photovoltaic device or a U.S.-made photovoltaic device, an individual public interest determination would be necessary.

5. Determination of unreasonable cost.

Both the Buy American Act and section 858 allow a determination not to utilize a domestic product if the cost of the domestic product is unreasonable. The section 858 determination must be on a case-by-case basis. With regard to determining that the cost of a domestic item is unreasonable, E.O. 10582 provides a methodology to determine unreasonable cost, using a minimum differential of 6 percent, but also provides that the head of an executive agency may determine that the use of a higher differential between the cost of materials of domestic origin and the cost of materials of foreign origin "is not unreasonable." The then Secretary of Defense, Cyrus Vance, signed a memorandum on May 7, 1964, providing for application of a 50 percent differential under the Buy American Act. Therefore, DoD proposes to continue application of a 50 percent evaluation factor when determining whether the price of domestic photovoltaic devices is unreasonable when the estimated aggregate value of the photovoltaic devices to be utilized is less than \$204,000 (the World Trade Organization Government Procurement Agreement threshold). DoD considers it reasonable and within its regulatory discretion to use 50 percent as the evaluation factor for determination that the cost of a domestic photovoltaic device is unreasonable. By continuing an established and familiar practice, there will be less confusion in implementation.



The application of an evaluation factor to foreign products to determine whether the price of domestic products is reasonable is not applicable when the World Trade Organization Government Procurement Agreement applies, because there is a prohibition under that agreement to buying any products that are not designated, domestic, U.S.-made, or qualifying country products. DoD has waived the application of the Buy American Act to U.S.-made products, so no evaluation factor is applicable. Likewise, if applicability of section 858 to U.S.-made photovoltaic devices is waived, then no evaluation factor is applicable.

6. Exemption for commercially available off-the-shelf (COTS) items.

Pursuant to 41 U.S.C. 1907 and determinations by the Administrator of Federal Procurement Policy, the component test of the Buy American Act does not apply to the acquisition of COTS items. This exemption does not apply to photovoltaic devices utilized under section 858, because section 858 no longer invokes the restrictions of the Buy American Act.

7. Trade agreements or otherwise provided by law.

Both section 846 and section 858 state that the restrictions are subject to the exceptions provided in the Trade Agreements Act or otherwise provided by law. The Trade Agreements Act (19 U.S.C. 2501 et seq.) provides authority for the President to waive the Buy American Act and other discriminatory provisions

(e.g., sections 846 and 858) for eligible products from designated countries. This authority has been delegated to the United States Trade Representative (USTR). The USTR has confirmed that the trade agreements provide an exception to the domestic source restrictions of section 858.

B. Regulatory implementation.

DoD is proposing changes to the DFARS as follows:

1. Definitions (DFARS 225.7017-1). Amend the definition of "covered contract" to conform to the wording of section 858, specifically adding "inside the United States" and changing "and" to "or" for the two conditions.

2. Restriction (DFARS 225.7017-3). Amend the restriction to cite section 858 and replace the reference to the Buy American Act with the specific requirements of section 858 for utilization of domestic photovoltaic devices, including "substantially all" domestic components.

3. Exceptions (225.7017-3). Delete the automatic exceptions for qualifying countries and Buy American unreasonable cost.

4. Waiver (DFARS 225.7017-4). Add a new section on waivers on a case-by case basis. This section provides examples of circumstances in which it may be appropriate to waive the restrictions of section 858, based on "Inconsistent with the public interest," in order to allow—

- Utilization of U.S.-made photovoltaic if the aggregate value of photovoltaic devices to be utilized on the contract is \$204,000 or more, the threshold for the World Trade Organization Government Procurement Agreement;

- Utilization of photovoltaic devices from a qualifying country; or

- Unreasonable cost, applicable only when the aggregate value of the photovoltaic devices to be installed under the contract is less than \$204,000 (the World Trade Organization Government Procurement Agreement threshold) and utilizing the evaluation factor of 50 percent, consistent with DoD implementation of other domestic source restrictions such as the Buy American Act and Balance of Payments Program.

5. Solicitation provision and contract clause (DFARS 225.7017-5). Amend the clause prescription to conform to the revised definition of "covered contract."

6. Provision and clause (DFARS 252.225-7017 and 252.225-7018).

- Amend the definition of "domestic photovoltaic device" in the clause to include the requirement that the cost of components mined, produced, or manufactured in the United States must exceed 50 percent of the cost of all components.

- Amend the restrictions in the clause to remove qualifying country photovoltaic devices and U.S.-made photovoltaic devices from being automatically acceptable unless the contractor specified their use in its offer.
- Update the statutory references in the clause.
- Remove the \$3,000 micro-purchase threshold from paragraph (c)(1) of the clause and from paragraph (b)(1) of the provision, because these thresholds were associated only with the Buy American Act, not section 858.
- Amend the certificate to accommodate the requirement for case-by-case determinations in order to allow contractors to utilize qualifying country or U.S.-made photovoltaic devices or to determine that the price of a domestic photovoltaic device is unreasonable.

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory

action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Determination of Applicability**

Consistent with the determinations that DoD made with regard to application of the requirements of section 846 of NDAA for FY 2011, DoD does not intend to apply the requirements of section 858 of the NDAA for FY 2015 to contracts at or below the simplified acquisition threshold (SAT), but does intend to apply the rule to contracts for the acquisition of commercial items, including COTS items.

##### **A. Applicability to Contracts at or Below the Simplified Acquisition Threshold.**

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, DPAP, is the appropriate authority to make comparable determinations

for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does not intend to make that determination. Therefore, this rule will not apply below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, including COTS items.

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. section 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy being the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Therefore, given that the requirements of section 858 of the NDAA for FY 2015 were enacted to promote utilization of domestic photovoltaic devices, and since photovoltaic devices are generally COTS items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

#### **V. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to implement section 858 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), by proposing changes to the regulatory coverage on utilization of domestic photovoltaic devices under certain covered contracts.

The objectives of this rule are to further promote utilization of domestic photovoltaic devices under DoD contracts, if such

contract does not include DoD purchase of photovoltaic devices as end products, but will nevertheless provide for a photovoltaic device to be (1) installed inside the United States on DoD property or in a facility owned by DoD; or (2) reserved for the exclusive use of DoD in the United States for the full economic life of the device. The legal basis for the rule is section 858 of the NDAA for FY 2015.

This rule generally applies at the prime contract level to other than small entities. When purchasing renewable power generated via on-site photovoltaic devices, DoD can either purchase the photovoltaic devices and thereby own, operate, and maintain the devices for their full economic life (already covered in DFARS part 225 under standard Buy American Act/Trade Agreements regulations) or, for example, may do some variation of the following:

- a. Enter into an energy savings performance contract, which is a contracting method in which the contractor provides capital to facilitate energy savings projects and maintains them in exchange for a portion of the energy savings generated. Under this arrangement, the Government would take title to the devices during contract performance or at the conclusion of the contract. For example, the Defense Logistics Agency-Energy uses the master Department of Energy indefinite delivery-indefinite quantity contract and awards task orders off that contract. Of



the 16 contractors, all are large businesses. There are subcontracting goals that each contractor has to meet, but the ultimate task order award is made to a large business.

b. Enter into a power purchase agreement, also referred to as a utility service contract, for the purchase of the power output of photovoltaic devices that are installed on DoD land or buildings, but owned, operated, and maintained by the contractor. At the conclusion of the contract, DoD would either require the contractor to dismantle and remove the photovoltaic equipment or abandon the equipment in place. Prime contractors for this type of contract would generally be large businesses, based on the capital costs involved in these projects. However, many developers tend to subcontract out the majority of work to smaller companies.

There are approximately 80 manufacturers of photovoltaic devices. We do not currently have data available on whether any of the manufacturers of photovoltaic devices are small entities, because FPDS does not collect such data on subcontractors.

There are no new reporting burdens under this rule. There are some negligible variations to the existing reporting burdens. Furthermore, since the prime contractors subject to this rule are other than small businesses, the reporting requirements will not impact small entities.

However, under section 858, if the aggregate value of the photovoltaic devices to be utilized under a contract is less than \$204,000, or unless a waiver is obtained for the utilization of U.S.-made products when the aggregate value of the photovoltaic devices is \$204,000 or more, there will be a requirement to track the origin of the components of the domestic photovoltaic devices. However, DoD estimates that most covered contracts will involve utilization of photovoltaic devices with an aggregate value in excess of \$204,000 and expects to grant waivers as appropriate.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives that meet the requirements of the statute and would have less impact on small entities. The ability for the Government to grant a waiver of section 858 if it is inconsistent with the public interest to preclude utilization of U.S.-made photovoltaic devices when the World Trade Organization Government Procurement Agreement is applicable (i.e., the aggregate value of the photovoltaic devices to be utilized is \$204,000 or more) will greatly reduce the burden on manufacturers of photovoltaic devices, regardless of size of the entity.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2015-D017), in correspondence.

#### **VI. Paperwork Reduction Act**

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C chapter 35); however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704-0229, entitled "Defense Federal Acquisition Regulation Supplement (DFARS) Part 225, Foreign Acquisition, and related clauses at DFARS 252.225."

#### **List of Subjects in 48 CFR Parts 212, 225, and 252**

Government procurement.

**Amy G. Williams,**

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are proposed to be amended as follows:

1. The authority citation for parts 212, 225, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. In section 212.301, revise paragraphs (f) (x) (I) and (f) (x) (J) to read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

(f) \* \* \*

(x) \* \* \*

(I) Use the clause at 252.225-7017, Photovoltaic Devices, as prescribed in 225.7017-5(a), to comply with section 858 of Pub. L. 113-291).

(J) Use the provision at 252.225-7018, Photovoltaic Devices—Certificate, as prescribed in 225.7017-5(b), to comply with section 959 of Pub. L. 113-291.

\* \* \* \* \*

**PART 225—FOREIGN ACQUISITION**

3. Revise sections 225.7017-1 through 225.7017-4 to read as follows:

**225.7017-1 Definitions.**

As used in this section—

Covered contract means a contract awarded by DoD that, by means other than DoD purchase as end products, provides for a photovoltaic device to be—

(1) Installed inside the United States on DoD property or in a facility owned by DoD; or

(2) Reserved for the exclusive use of DoD in the United States for the full economic life of the device.

Designated country photovoltaic device, domestic photovoltaic device, foreign photovoltaic device, Free Trade Agreement country photovoltaic device, photovoltaic device, qualifying country photovoltaic device, and U.S.-made photovoltaic device are defined in the clause at 252.225-7017, Photovoltaic Devices.

#### **225.7017-2 Restriction.**

In accordance with section 858 of the National Defense Authorization Act for Fiscal Year 2015, photovoltaic devices provided under any covered contract shall be manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, except as provided in 225.7017-3 and 225-7017-4.

#### **225.7017-3 Exceptions.**

(a) Free Trade Agreements. For a covered contract that utilizes photovoltaic devices valued at \$25,000 or more, photovoltaic devices may be utilized from a country covered under

the acquisition by a Free Trade Agreement, depending upon dollar threshold (see FAR subpart 25.4).

(b) World Trade Organization-Government Procurement Agreement.

For covered contracts that utilize photovoltaic devices that are valued at \$204,000 or more, only domestic photovoltaic devices or designated country photovoltaic devices may be utilized, unless acquisition of U.S.-made or qualifying country photovoltaic devices is allowed pursuant to a waiver in accordance with 225.7017-4(a).

**225.7017-4 Waivers.**

The head of the contracting activity is authorized to waive, on a case-by-case basis, the application of the restriction in 225.7017-2 upon determination that one of the following circumstances applies (see PGI 225.7017-4 for sample determinations and findings):

(a) Inconsistent with the public interest. For example, a public interest waiver may be appropriate to allow-

(1) Utilization of U.S.-made photovoltaic devices if the aggregate value of the photovoltaic devices to be utilized under the contract exceeds \$204,000; or

(2) Utilization of photovoltaic devices from a qualifying country, regardless of dollar value.

(b) Unreasonable cost. A determination that the cost of a domestic photovoltaic device is unreasonable may be appropriate if-

(1) The aggregate value of the photovoltaic devices to be utilized under the contract does not exceed \$204,000; and

(2) The offeror documents to the satisfaction of the contracting officer that the price of the foreign photovoltaic devices plus 50 percent is less than the price of comparable domestic photovoltaic devices.

4. Add section 225.7017-5 to read as follows:

**225.7017-5 Solicitation provision and contract clause.**

(a)(1) Use the clause at 252.225-7017, Photovoltaic Devices, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for a contract that—

(i) Is expected to exceed the simplified acquisition threshold; and

(ii) May be a covered contract, i.e., a contract that provides for a photovoltaic device to be—

(A) Installed inside the United States on DoD property or in a facility owned by DoD; or

(B) Reserved for the exclusive use of DoD in the United States for the full economic life of the device.

(2) Use the clause in the resultant contract, including contracts using FAR part 12 procedures for the acquisition of commercial items, if it is a covered contract.

(b) Use the provision at 252.225-7018, Photovoltaic Devices—Certificate, in solicitations, including solicitations using FAR

part 12 procedures for the acquisition of commercial items, that contain the clause at 252.225-7017.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. Section 252.225-7017 is amended by—

- a. In the introductory text, removing “225.7017-4(a)” and adding “225.7017-5(a)” in its place;
- b. Removing the clause date “(JAN 2014)” and adding “(DATE)” in its place;
- c. In paragraph (a), revising the definition of “Domestic photovoltaic device”; and
- d. Revising paragraphs (b) and (c).

The revisions read as follows:

**252.225-7017 Photovoltaic Devices.**

\* \* \* \* \*

(a) \* \* \*

Domestic photovoltaic device means a photovoltaic device—

- (i) Manufactured in the United States; and
- (ii) The cost of its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic.



\* \* \* \* \*

(b) This clause implements section 858 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291).

(c) Restriction. If the Contractor specified in its offer in the Photovoltaic Devices-Certificate provision of the solicitation that the estimated value of the photovoltaic devices to be utilized in performance of this contract would be-

(1) Less than \$25,000, then the Contractor shall utilize only domestic photovoltaic devices unless, in its offer, it specified utilization of qualifying country or other foreign photovoltaic devices in paragraph (c)(2) of the Photovoltaic Devices-Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device, the Contractor shall utilize a qualifying country photovoltaic device as specified, or, at the Contractor's option, a domestic photovoltaic device;

(2) \$25,000 or more but less than \$79,507, then the Contractor shall utilize in the performance of this contract only domestic photovoltaic devices unless, in its offer, it specified utilization of Canadian, qualifying country, or other foreign photovoltaic devices in paragraph (c)(3) of the Photovoltaic Devices-Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device or a Canadian photovoltaic device, the

Contractor shall utilize a qualifying country photovoltaic device or a Canadian photovoltaic device as specified, or, at the Contractor's option, a domestic photovoltaic device;

(3) \$79,507 or more but less than \$100,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices, or Free Trade Agreement country photovoltaic devices (other than Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic devices), unless, in its offer, it specified utilization of qualifying country or other foreign photovoltaic devices in paragraph (c)(4) of the Photovoltaic Devices—Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device or a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device), the Contractor shall utilize a qualifying country photovoltaic device; a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) as specified, or, at the Contractor's option, a domestic photovoltaic device;

(4) \$100,000 or more but less than \$204,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices, or Free Trade Agreement country photovoltaic devices (other than Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic devices), unless, in its offer, it specified

utilization of qualifying country or other foreign photovoltaic devices in paragraph (c)(4) of the Photovoltaic Devices—Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device or a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device), the Contractor shall utilize a qualifying country photovoltaic device; a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) as specified, or, at the Contractor's option, a domestic photovoltaic device; or

(5) \$204,000 or more, then the Contractor shall utilize under this contract only domestic or designated country photovoltaic devices unless, in its offer, it specified utilization of U.S.-made or qualifying country photovoltaic devices in paragraph (c)(5) of the Photovoltaic Devices—Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a designated country, U.S.-made, or qualifying country photovoltaic device, the Contractor shall utilize a designated country, U.S.-made, or qualifying country photovoltaic device as specified, or, at the Contractor's option, a domestic photovoltaic device.

\* \* \* \* \*

6. Section 252.225-7018 is amended by—

- a. In the introductory text, removing "225.7017-4(b)" and adding "225.7017-5(b)" in its place;
- b. Removing the clause date "(JAN 2014)" and adding "(DATE)" in its place;
- c. Revising paragraph (b);
- d. In paragraph (c), removing "(See [http://www.cbp.gov/xp/cgov/trade/legal/rulings/.](http://www.cbp.gov/xp/cgov/trade/legal/rulings/))" and adding "(See <http://www.cbp.gov/trade/rulings.>)" in its place; and
- e. Revising paragraph (d).

The revisions read as follows:

**252.225-7018 Photovoltaic Devices—Certificate.**

\* \* \* \* \*

(b) Restrictions. The following restrictions apply, depending on the estimated aggregate value of photovoltaic devices to be utilized under a resultant contract:

(1) If less than \$204,000, then—

(i) The Government will not accept an offer specifying the use of other foreign photovoltaic devices in paragraphs (d)(2)(iii), (d)(3)(iii), (d)(4)(iii), or (d)(5)(iii) of this provision, unless the Offeror documents to the satisfaction of the Contracting Officer that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device and the Government determines in

accordance with DFARS 225.217-4 that the price of a comparable domestic photovoltaic device would be unreasonable; and

(ii) The Government will not accept an offer specifying the use of a qualifying country photovoltaic device unless the Government determines in accordance with 225.217-4 that it is in the public interest to allow use of a qualifying country photovoltaic device.

(2) If \$204,000 or more, then the Government will consider only offers that utilize photovoltaic devices that are domestic or designated country photovoltaic devices, unless the Government determines in accordance with DFARS 225.7017-4, that it is in the public interest to allow use of a qualifying country photovoltaic device or a U.S.-made photovoltaic device.

\* \* \* \* \*

(d) Certification and identification of country of origin.

[The Offeror shall check the block and fill in the blank for one of the following paragraphs, based on the estimated value and the country of origin of photovoltaic devices to be utilized in performance of the contract:]

\_\_\_ (1) No photovoltaic devices will be utilized in performance of the contract.

(2) If less than \$25,000—

\_\_\_ (i) The Offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device;

\_\_\_ (ii) The Offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country photovoltaic device [Offeror to specify country of origin\_\_\_\_\_]; or

\_\_\_ (iii) The foreign (other than qualifying country) photovoltaic devices to be utilized in performance of the contract are the product of \_\_\_\_\_. [Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e., that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(3) If \$25,000 or more but less than \$79,507—

\_\_\_ (i) The Offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device or a Canadian photovoltaic device [Offeror to specify country of origin\_\_\_\_\_];

\_\_\_ (ii) The Offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country photovoltaic device [Offeror to specify country of

origin\_\_\_\_\_]; or

\_\_\_\_ (iii) The foreign (other than qualifying country or Canadian) photovoltaic devices to be utilized in performance of the contract are the product of \_\_\_\_\_. [Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device[, i.e., that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(4) If \$79,507 or more but less than \$100,000—

\_\_\_\_ (i) The Offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device; a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) *[Offeror to specify country of origin\_\_\_\_\_]*;

\_\_\_\_ (ii) The Offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country (except Australian or Canadian) photovoltaic device; [Offeror to specify country of origin\_\_\_\_\_];

or

\_\_\_\_ (iii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (d) (4) (i) or

(d) (4) (ii) of this provision) are the product of \_\_\_\_\_.  
[Offeror to specify country of origin, if known, and provide  
documentation that the cost of a domestic photovoltaic device would  
be unreasonable in comparison to the cost of the proposed foreign  
photovoltaic device, i.e., that the price of the foreign  
photovoltaic device plus 50 percent is less than the price of a  
comparable domestic photovoltaic device.]

(5) If \$100,000 or more but less than \$204,000—

\_\_\_ (i) The Offeror certifies that each photovoltaic device  
to be utilized in performance of the contract is a domestic  
photovoltaic device; a Free Trade Agreement country photovoltaic  
device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian  
photovoltaic device) [Offeror to specify country of  
origin \_\_\_\_\_];

\_\_\_ (ii) The Offeror certifies that each photovoltaic device  
to be utilized in performance of the contract is a qualifying  
country (except Australian or Canadian) photovoltaic device  
[Offeror to specify country of origin \_\_\_\_\_]; or

\_\_\_ (iii) The offered foreign photovoltaic devices (other  
than those from countries listed in paragraph (d) (4) (i) or  
(d) (4) (ii) of this provision) are the product of  
\_\_\_\_\_. [Offeror to specify country of origin, if  
known, and provide documentation that the cost of a domestic  
photovoltaic device would be unreasonable in comparison to the cost



of the proposed foreign photovoltaic device, i.e., that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(6) If \$204,000 or more, the Offeror certifies that each photovoltaic device to be used in performance of the contract is—

\_\_\_ (i) A domestic or designated country photovoltaic device  
[Offeror to specify country of origin\_\_\_\_\_];

\_\_\_ (ii) A U.S.-made photovoltaic device; or

\_\_\_ (iii) A qualifying country photovoltaic device.  
[Offeror to specify country of origin\_\_\_\_\_].

\* \* \* \* \*

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